Supreme Court, U.S.
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No. 02-649

Supreme Court of the United States

DEE-K ENTERPRISES, INC. AND
ASHEBORO ELASTICS CORP.,
Petitioners,

v.

HEVEAFIL SDN. BHD., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENTS

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Pursuant to Rule 15.8 of the Rules of this Court, Respondents file this supplemental brief to address new issues raised in (1) the *amicus curiae* brief of the United States and the Federal Trade Commission ("Gov't Br."), and (2) Petitioners' supplemental brief ("Supp."). Respondents incorporate by reference the Rule 29.6 Corporate Disclosure Statement set forth in their Brief in Opposition.

ARGUMENT

The Government and Respondents agree that "[t]he petition for a writ of certiorari should be denied." Gov't Br. 15; Opp. 25.

1. The Government and Respondents agree that the Fourth Circuit's decision neither implicates nor creates a conflict among the circuits. *See* Gov't Br. 11-12 (distinguishing *Carpet Group* and *Nippon Paper* and concluding that "there is no clear conflict calling for this Court's review"); Opp. 19-23 (arguing that *Carpet Group* and *Nippon Paper* are consistent with this case).

Petitioners' new argument that *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942 (7th Cir. 2003) (en banc), conflicts with the decision below, Supp. 9, is incorrect. The issue in that case—whether the effects test under the Foreign Trade Antitrust Improvement Act ("FTAIA") goes to subject-matter jurisdiction or the merits, 322 F.3d at 944—is not implicated by the petition because this is not a FTAIA case. Also, rather than early dismissal of their claims under Rule 12(b)(1) of the Federal Rules of Civil Procedure, here Petitioners received a full trial on the merits. *See* Pet. App. 27a (Fourth Circuit noting that the district court did not dismiss Petitioners' case and that they had their "day in court").

Petitioners also rely on *United Phosphorus* to argue that the district court's submission of the "substantial effect" issue to the jury was incorrect. Supp. 8-9. The Government

and Respondents agree that this question "is not properly before this Court." Gov't Br. 14; *see* Opp. 6 (arguing that Petitioners repeatedly failed to remove the question from the jury at trial and waived the argument before the court of appeals); Pet. App. 7a n.1 ("Dee-K does not appeal the denial of its Rule 50 motion."); *cf. United States v. Williams*, 504 U.S. 36, 42 (1992) ("[W]e will not review a question not pressed *or* passed on by the courts below.") (quotation omitted). Nevertheless, Petitioners contend that only a court has the power "to determine when undisputed facts satisfy th[e] jurisdictional requirement." Supp. 8. The facts of this case, however—whether acts of price fixing occurred in the United States—were hotly disputed. Moreover, far from being "non-reviewable," Supp. 9, the jury's verdict has been reviewed for error twice—by the district court and by the court of appeals. *See* Opp. 5-6 (discussing the district court's and the court of appeals' review of the verdict). At bottom, because Petitioners received the trial they sought in the first instance, they cannot fairly claim to have been prejudiced by the jury's consideration of the question.

2. The Government and Respondents agree that Petitioners' proposed jury instructions render this case an inadequate vehicle for certiorari review. *See* Gov't Br. 12-13 (citing C.A. App. 3663 and arguing that Petitioners' final proposed jury instruction was "*inconsistent* with *McLain* [*v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980)]," was "not a correct statement of the law" because it gave the effects issue to the jury, and was "not materially different from the instruction actually given"); Opp. 7 (citing C.A. App. 3663 and describing Petitioners' assignment of the effects issue to the jury). Petitioners incorrectly suggest that a new *McLain* instruction would have led to a different result, although as the Government argues, it is not "clear that petitioners would have prevailed had the court instructed the jury" as they now propose. Gov't Br. 13.

Contrary to Petitioners' contention, their objection to the jury instructions was not "timely." Supp. 5. Petitioners did not object to an instruction under *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), until after they had requested that the case be tried under *Hartford Fire*, and after the trial was halfway over. *See* Opp. 8 (discussing Petitioners' reversal after day five of an eight-day trial). Petitioners make the conclusory assertion that Respondents would not have been prejudiced by Petitioners' failure to timely object, Supp. 6 n.3, yet Petitioners fail to explain how their proposed change in jury instructions late in the trial would not have been prejudicial. *Cf. City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) ("We think, however, that there would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and *indeed itself requested*.") (emphasis added).

3. While opposing a writ of certiorari, the Government argues that the court of appeals used the wrong test to reach the correct result, and Petitioners seize upon this argument. Gov't Br. 6; Supp. 2. Both are mistaken. The "conduct" proscribed by the Sherman Act are anticompetitive acts of agreement, not whatever acts follow the agreement. *See* 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."); *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 330 (1991) ("[T]he essence of any violation of § 1 is the illegal agreement itself—rather than the overt acts performed in furtherance of it . . . ."), *quoted in Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 398-99 (2d Cir. 2002) (holding that the illegal act "was *not* the imposition of high prices, but the formation of the agreement") (emphasis added); Opp. 14-15 (proving that under the facts of *Hartford Fire*, "conduct" equals "agreement").

The Government's and Petitioners' focus on Respondents' sales into the United States as a determinant of the jurisdictional test, Gov't Br. 9-10; Pet. 21, cannot be reconciled with *Hartford Fire*. *See* 509 U.S. at 770, 779, 795-96, 819 n.10 (focusing on "foreign conduct" in spite of the presence of U.S. co-conspirators, overt acts in furtherance in the United States, and sales of affected insurance policies into and within the United States); *see also United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945) (observing that agreements were concluded abroad); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986) (noting that agreement was reached in Japan); Opp. 15-17 (discussing divergence of tests for foreign and domestic agreements). The Fourth Circuit applied *Hartford Fire* simply because "the agreements here were all formed entirely outside the United States," like those in *Hartford Fire*. Pet. App. 26a.

In any event, whether a "substantial effect" or "jurisdictionally significant" test is applied to this case, the result is the same because the jury did not believe that the alleged conspiracy affected price levels in the United States. *See* Gov't Br. 13 ("[T]he jury's verdict appears to reject petitioners' argument that the conspiracy actually affected price levels in the United States."); Pet. App. 7a n.1 ("the producers provided the jury with a good deal of evidence supporting the challenged finding" that price-fixed goods were not sold in U.S. commerce).

Finally, Petitioners cannot find refuge in their proposed alternate disposition of summary reversal because this is an "extraordinary remedy" not applicable to this case. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 512 (2001) (per curiam) (Stevens, J., dissenting); Supp. 2 n.1. Summary reversal is not appropriate because the result below is correct and in any event is not "clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (per curiam)

(Marshall, J., dissenting). Summary reversal is reserved for clear errors, frequently of a constitutional dimension. *See, e.g.*, *Kirk v. Louisiana*, 536 U.S. 635, 635-36 (2002) (per curiam) (summarily reversing decision permitting warrantless entry, arrest, and search in violation of settled Court precedent).

CONCLUSION

Given the lack of a circuit split, Petitioners' waivers at trial and on appeal, and the correct result on appeal (including affirmance of a fact-bound jury verdict), this case does not raise a question warranting this Court's review. As advocated by the Government, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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